In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-33

AIR TERMINAL CAB, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. A22-A36) is reported at 341 F. Supp. 1257. The opinion of the court of appeals (Pet. App. A11-A21) is not yet officially reported, but is unofficially reported at 31 A.F.T.R. 2d 73-1298.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1973, and a petition for rehearing was denied on May 22, 1973. The petition for a writ of certiorari was filed on June 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' taxicab drivers are employees for purposes of federal employment taxes under the Federal

Insurance Contributions Act, the Federal Unemployment Tax Act, and the employee income tax withholding provisions.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Insurance Contributions Act (Section 3121(d)(2) of the Internal Revenue Code of 1954) and Section 31.3121(d)-1 of the Treasury Regulations on Employment Tax (1954 Code) are set forth in Appendix A of the petition (pp. A1-A2). Substantially identical provisions which are not set forth are applicable under the Federal Unemployment Tax Act (Section 3306(i)(1) of the Code and Treasury Regulations Section 31.3306(i)-1) and under the employee income tax withholding provisions (Section 3401(c) of the Code and Treasury Regulations Section 31.3401(c)-1).

STATEMENT

Petitioners are two corporations engaged in the taxicab business in Missouri. Each petitioner has a business license or franchise that permits it to operate taxicabs within St. Louis County, but with the limitation that it can pick up passengers only in the unincorporated areas of the County. As a practical matter, the primary source of passengers in the restricted area is Lambert Airfield, where the petitioners' taxicabs wait in line for available passengers (Pet. App. A13).

Each petitioner owns and operates 12 taxicabs. All liability insurance necessary for their operation is furnished by petitioners. The taxicabs are equipped with fare meters and have the respective company name printed in black letters on the cab doors, but none of the cabs has radio communications equipment. When not in use, the taxicabs are parked at separately owned service stations, in return for which each petitioner

contracts out to the particular service station the minor maintenance work needed on the taxicabs (Pet. App. A13-A14).

Petitioners' drivers are members of Local 688, Warehouse and Distribution Workers Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America. Pursuant to union contracts between Local 688 and petitioners, the drivers are required to work a minimum of nine hours per day, five days per week. The contracts permit petitioners to establish working times for the drivers and require petitioners to provide fringe benefits such as paid vacations and holidays, sick leave and pension plans. Additionally, petitioners have the right to discharge the drivers pursuant to the union grievance procedure set forth in the contracts (Pet. App. A15-A16, A21).

The drivers begin work each day by picking up the taxicabs regularly assigned to them and proceeding directly to Lambert Airfield to pick up passengers. After discharge of each passenger, the drivers return to the airport for other passengers. Each driver makes approximately six trips during each shift. Petitioners require that the taxicabs be used for the transportation of passengers and not for personal use during the time that the drivers have possession of the taxicabs. At the end of each shift, the drivers return the taxicabs to the service stations, where they are parked until the beginning of the next shift (Pet. App. A14-A15).

The drivers are compensated by retaining one half of the total amount of fares collected after deduction of gasoline and oil expenses. At the end of each working day, the drivers deposit petitioners' share of the fares in a metal strong box at the service station where the taxicabs are parked when not in use. Additionally, each

driver deposits a trip sheet which he is required to maintain and which shows the pick-up point, destination, and fare for each passenger transported. Petitioners furnish the trip sheets and envelopes used by the drivers to deposit the fares (Pet. App. A14-A15).

The Commissioner of Internal Revenue determined that petitioners were employers of the drivers and assessed applicable withholding, social security, and unemployment taxes against them for the years in issue. After partial payment of the assessments and filing of petitioners' claims for refund, petitioners brought suit in the district court for a refund of the employment taxes (Pet. App. A24-A27). The district court, on the facts as stipulated by the parties, determined that the drivers were not petitioners' employees because petitioners did not maintain sufficient control over the means and method by which the drivers performed their services (Pet. App. A32-A36).

The court of appeals reversed, holding that a common-law employer-employee relationship existed and that petitioners therefore are liable for the relevant federal taxes (Pet. App. A16-A21). The court's holding was based on a consideration of (1) petitioners' right to control the work activities of the drivers, (2) petitioners' continued interest, based on a percentage of the fares collected, in the profits of the taxicabs' business (as opposed to a mere rental arrangement), (3) the drivers' rights, under union contract, to fringe benefits such as paid vacations and holidays, sick leave, and pensions, (4) petitioners' rights, under contract, to discharge the drivers for cause, and (5) the lack of any capital outlay by the drivers (even for oil and gas) which would tend to raise their status to that of independent contractors pursuing a separate trade or business.

ARGUMENT

The decision below is correct. There is neither a conflict of decisions nor any other reason for further review.

1. Sections 3121(d)(2), 3306(i)(1) and 3401(c) of the Internal Revenue Code of 1954, as implemented by the Treasury Regulations, make the well-established common-law rules for determining whether an employer-employee relationship exists applicable for purposes of federal employment taxes. It is uniformly recognized that the employer's right to control the manner and method of performing services is the most important factor to be considered under the common-law rules, with other important criteria being the right to discharge the employee, the furnishing of tools and a place to work, opportunities for profit or loss, the employer's investment in facilities, the permanency of the relationship, and the skills required by the employee or independent contractor. *United States* v. *Webb, Inc.*, 397 U.S. 179, 192-194; *Enochs* v. *William Packing Co.*, 370 U.S. 1, 3; *United States* v. *Silk*, 331 U.S. 704, 716.

In the present case, as the court of appeals appropriately recognized (Pet. App. A19-A21), the stipulated facts abundantly demonstrated the existence of virtually every factor which has been deemed significant in establishing a common-law employer-employee relationship—including the right to control the drivers in the manner of performing their services, the right to discharge the drivers for cause pursuant to labor contracts, the furnishing of all equipment and services necessary for the drivers to perform their assigned duties (with the drivers furnishing only labor), the requirement of daily fare reporting and accounting, and the payment of normal employee fringe benefits, such as paid vacations and holidays, sick leave, and pensions. In view of

these facts, the court of appeals properly concluded that the drivers are employees of the petitioners and not independent contractors.

2. Contrary to petitioners' assertion (Pet. 5-6), the decision below does not conflict with *Party Cab Co.* v. *United States,* 172 F. 2d 87 (C.A. 7). The drivers involved in *Party Cab* paid a fixed rental fee for the use of the cabs they drove and were subject to little control over their daily routine other than fixed working hours. During their working period, the drivers could refuse to accept passengers if they deemed it appropriate and were not required to account to the company for the fares collected. In contrast, petitioners require that the taxicabs be used for the transportation of passengers and not for personal use during the time that the drivers have possession of the cabs. Petitioners further require that their drivers maintain trip sheets showing the pick-up point, destination and fare for each passenger transported, and require that these trip sheets, along with 50 percent of the net proceeds, be deposited daily at assigned locations. These clear manifestations of control over the details and means by which the drivers perform their services and the companies' interest in the fares distinguish the present case from the rental agreement in *Party Cab* and establish the factual support for the conclusion that an employer-employee relationship exists. See *United States* v. *Webb, Inc., supra; United States* v. *Fleming,* 293 F. 2d 953 (C.A. 5).[1]

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[1]There is no basis for petitioners' unsupported statement (Pet. 6) that the decision below will quickly result in changes in both the published and the unpublished positions of the Internal Revenue Service. As the court below correctly noted (Pet. App. A19), its determination is in complete harmony with the published and unpublished rulings issued to other taxicab companies.

3. Finally, petitioners contend (Pet. 7-9) that the court of appeals has indirectly adopted the congressionally proscribed "economic reality" test in determining the status of their drivers. The court specifically recognized, however, that Congress repudiated any judicial extension of the term "employee" beyond the common-law rules (Pet. App. A12). It applied recognized common-law factors in characterizing the relationship between petitioners and their drivers, noting that control, either actual or the right to it, is the basic test used to determine that relationship (Pet. App. A18-A21). There is not the slightest indication that the court varied from congressionally mandated common-law principles in reaching its determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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